FILE COPY

NO. 234

Office Supreme Court, U. S.
FILED
DEC 8 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY PRENTISS & COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

JEFFERY & REDMOND,
Attorneys for Respondent.

JOSEPH F. MURRAY,
WILLIAM P. JEFFERY,
ARTHUR MATTSON,
of Counsel.

INDEX.

	PAGE
Opinions Below	1
Questions Presented by Petitioner	1
Questions Presented by Respondent	2
Statutes and Regulations Involved	4
Statement	4
Summary of Argument	7
Argument	7
POINT I. The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.	7
POINT II. The "brief" filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for refund sufficient to support the maintenance of this suit.	17
POINT III. Petitioner has failed to show either by reason or authority that the decision of the Circuit Court of Appeals should be reversed	21
POINT IV. The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of the intangible property acquired in 1916	29
Conclusion	36
Appendix	37

Citations.

	PAGE
Appeal of Mandel Brothers, 4 B. T. A. 341	33
Art Metal Const. Co. v. United States, 47 F. (2d) 558; cert. denied, 283 U. S. 863	26
Bemis Bros. Hay Co. v. United States, 60 F. (2d) 944	26
Bonwit Teller & Co. v. United States, 283 U. S. 258	10, 16, 19
Crossett v. United States, 50 F. (2d) 292	35
Delk v. St. Louis & S. F. R. Co., 220 U. S. 580	4
Doyle v. Mitchell, 247 U. S. 179	33
D. N. & E. Walter & Co., Inc., 10 B. T. A. 620	33
Feather River Lumber Co. v. United States, 66 Ct. Cls. 54	25
Grays Harbor Motorship Corp. v. United States, 45 F. (2d) 259; cert. denied, 284 U. S. 627	26
Howbert v. Penrose, 38 F. (2d) 577	16
Isbell Porter Co. v. Comm. of Int. Rev. 40 F. (2d) 432	33
Jonesboro Grocer Co. v. United States, 66 Ct. Cls. 320; cert. denied, 280 U. S. 562	24
La Belle Iron Works v. United States, 256 U. S. 377	35
Lafayette-South Side Bank v. Comm., 33 F. (2d) 646	33, 35
Lancaster Cotton Mills v. United States, 59 F. (2d) 270	10, 20
Landesman v. Comm., 44 F. (2d) 521	35
Langnes v. Green, 282 U. S. 530	4
Lehigh & Wilkes Barre Coal Co. v. United States, 38 F. (2d) 637	14, 20
Lissner Co. v. United States, 52 F. (2d) 1058	27
McKesson & Robbins Co. v. Edwards, 57 F. (2d) 147	20
Memphis Cotton Oil Co. v. United States, 59 F. (2d) 276	20
Michel v. United States, 37 F. (2d) 38, 282 U. S. 656	23, 27

PAGE

Penn. Cent. Brewing Co., 9 B. T. A. 264 33

Red Wing Malting Co. v. Willcuts, 15 F. (2d) 626; cert. denied, 273 U. S. 763 11

Snead v. Elmore, 59 F. (2d) 312 26
Solomon v. United States, 57 F. (2d) 150 28
St. Louis Screw Company, 2 B. T. A. 649 ..... 14, 31, 34, 36
Stevens Engraving Co. v. United States, 53 F. (2d) 1; cert. denied 284 U. S. 687 27
Story Parchment Co. v. Paterson Parchment Co., 282 U. S. 555 4

Taylor-Lockwood Co. v. United States, 45 F. (2d) 284 28
Tucker v. Alexander, 275 U. S. 228 ..... 11, 17, 19
Tyler & Hippach, Inc., 6 B. T. A. 636 33

Union & New Haven Trust Co. v. Eaton, 20 F. (2d) 419 ..... 10, 11
Union Trust Co. v. McCaughn, 24 F. (2d) 459 19
United States v. Felt & Tarrant Co., 283 U. S. 269 24

Warner v. Walsh, 24 F. (2d) 449 ..... 10, 11
Warner v. Walsh, 27 F. (2) 952 12
Williams & Co. v. United States, 46 F. (2d) 155 28
Wunderle v. McCaughn, 38 F. (2d) 258 12

Zeller v. United States, 35 F. (2d) 870 20

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1091, 1092, 1093—

Sec. 325 ..... 31, 37
Sec. 326 ..... 2, 14, 31, 35, 38
Sec. 327 ..... 14, 40
Sec. 328 ..... 14, 40

Revenue Act of 1921, c. 136, 42 Stat. 227, 268—

Sec. 252 41

PAGE

Revenue Act of 1924, c. 234, 43 Stat. 253, 342—

Sec. 1012 (U. S. C., Title 26, Sec. 157) 42

Revenue Act of 1926, c. 27, 44 Stat. 9, 116—

Sec. 284 (U. S. C. App., Title 26, Sec. 1065) 42
Sec. 1113 (U. S. C. App., Title 26, Sec. 156) 8, 44

Regulations:

Treasury Regulations 62; Art. 1036 44
Treasury Regulations 65; Art. 1306 ..... 8, 9

IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

v.

HENRY PRENTISS & COMPANY, INC.,
Respondent.

Opinions Below.

The opinion of the District Court (R. 25-27) is reported in 46 F. (2d) 159. The opinion of the Circuit Court of Appeals (R. 76-79) is reported in 57 F. (2d) 676.

Question Presented by Petitioner.

The sole issue raised by the petitioner is whether respondent is barred from recovering an overpayment of tax for the year 1918, which it is otherwise concededly entitled to recover, because of the statutory requirement that claim for refund must be "duly filed" with the Commissioner before suit for recovery of the tax involved may be begun.

Claim for refund of taxes for 1918 was filed in time, but the District Court held that suit was brought on "facts" other than those presented to the Commissioner of Internal Revenue. The Circuit Court of Appeals reversed,

holding that the contentions advanced in the suit were set out in an "additional brief" (accepted and considered by the Commissioner before the claim was rejected) which, although submitted after the time for filing claims had expired, was merely an amendment of the seasonably filed claim and, therefore, that the statutory requirement had been complied with.

Respondent has consistently adhered to the position that suit was brought on data set forth both in the original claim for refund and the so-called amendment.

Question Presented by Respondent.

The respondent presents and asks the Court to consider the question whether under the evidence the respondent was entitled to increased invested capital for the years 1918 and 1920 under Section 326 of the Revenue Act of 1918—C. 18, 40 Stat. 1057, 1091, 1092, 1093—because of the acquisition by respondent of intangible property included in a mixed aggregate of tangible and intangible property acquired by respondent for its stock.

Respondent's question arises in this manner. Action was instituted to recover over-payments of taxes for the years 1918 and 1920, because of the failure of the Commissioner to include in its invested capital for those years two items of property: (a) actual value of real estate; (b) actual value of intangible property consisting of good will, contracts, etc. The District Court held respondent was entitled to increased invested capital in respect of both kinds of property. Because of an alleged insufficient refund claim for 1918, relief was denied for 1918, but was granted

for 1920. The Circuit Court of Appeals held that respondent was not entitled to increased invested capital in respect of the intangibles, but was so entitled in respect of the real estate. It held the refund claim for 1918 to be sufficient and allowed a recovery in respect of the real estate for both 1918 and 1920. The United States raises no questions as to the propriety of the recovery allowed for 1920.

The United States filed its petition for certiorari on the last day permissible, without previous notice to respondent's attorneys, although they believed they had an understanding that they would be advised of such contemplated action in time to file a cross petition for certiorari.

The reason for respondent's failure to apply for certiorari is set out in the affidavit of Joseph F. Murray, counsel for respondent, dated August 26, 1932, filed with respondent's brief in opposition to the petition for certiorari filed by the United States.

The question presented by respondent has never been considered by this Court or any other tribunal on like facts, except the Circuit Court of Appeals in this case, and the Board of Tax Appeals. The rulings of the latter tribunal support respondent's contention.

In the circumstances respondent feels that it is entitled to present to this Court and have considered by it the issue of whether or not the Circuit Court of Appeals erred in refusing to include intangibles in invested capital for both 1918 and 1920. The rulings of this Court in the following cases amply support its jurisdiction in the premises, and we believe that this is a proper situation for the Court in its discretion to exercise such jurisdiction.

Delk v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588, 589;
Langnes v. *Green*, 282 U. S. 530, 535, 539;
Story Parchment Co. v. *Paterson Parchment Co.*, 282 U. S. 555, 560.

Accordingly, respondent will argue the merits of the question of the inclusion of intangibles in invested capital for 1918 and 1920 under Point IV of this brief. In order not to create confusion, such facts as are material to that question will be separately stated under that point.

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in full in the Appendix (pp. 37, etc., *infra*).

Statement of the Case.

Facts as to the Refund Claim for 1918.

Respondent filed its income and excess profits tax for 1918 on June 16, 1919, and paid the tax shown to be due. An application for a special assessment, based on abnormal conditions in its income and *invested capital* was attached to the return. On March 25, 1924, respondent seasonably filed its claim for refund (R. 42½), based on the contention, among others, that:

> "• • • an abnormal condition existed in both its income and *invested capital*"

and stating that *when the claim was considered* the taxpayer would

> "* * * submit further evidence in connection with special assessment."

The claim for refund and request for special assessment arose from the fact that respondent was incorporated in 1916 to take over the business and assets, including a mixed aggregate of *tangible* and *intangible* property, of another corporation. This situation was also reflected in the answer to question 8 in the 1918 return (Plaintiff's Exhibit 1, not printed). In 1925 and 1926, after the filing of the claim for refund, several partial refunds based on adjustments of income and *invested capital* as shown in the 1918 return, were granted (Plaintiff's Exhibits 16, 17, 18, not printed).

By letter dated July 16, 1925, the Commissioner informed respondent that "your claim *will be* rejected" (R. 46). On February 23, 1926, the Commissioner through the Solicitor of Internal Revenue, wrote respondent as follows:

> "You are advised that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919, your application for special assessment. Some question has arisen as to the denial of special assessment. However, *before a final decision is reached* you will be granted an opportunity to be heard orally if you so desire" (R. 46, 47).

An oral hearing was had March 15, 1926. After that hearing, respondent executed and filed an affidavit with schedules attached dated April 8, 1926, which the Circuit Court of Appeals called an amendment of the previously filed claim for refund (Plaintiff's Exhibit 12, not printed). This document began with the statement that it was submitted:

> "* * * in support of the claims and statements discussed at said hearing",

specifically set forth the facts and data upon which this suit is based, and concluded with the request that:

> "* * * taxpayers *invested capital* be adjusted."

Although Plaintiff's Exhibit 12 is not printed, a digest of it is contained in refund claim for 1920 (Plaintiff's Exhibit 13) and is used as a basis for relief for 1920 (R. 47-49).

At the trial in the District Court respondent offered evidence as to what transpired at the hearings in Washington for the purpose of showing that the same questions presented in this action were discussed and considered at the hearings before the Commissioner. This offer of proof was rejected by the District Court and exception taken (R. 18).

The claim for refund was rejected September 3, 1926, by the signing of the rejection schedule by the Commissioner.

Suit was begun by respondent in September, 1927, by petition which alleged that the Commissioner erred in not increasing respondent's *invested capital* by including therein certain values for *tangible* and *intangible* property. The petition also alleged, among other things, that claim for refund of the tax sought to be recovered had been duly filed. The answer admitted these allegations (R. 50). Approximately two and a half years later, when the case was about to be reached for trial, petitioner was permitted to amend its answer to set up the alleged technical insufficiency of the refund claim. In the application to amend, petitioner stated that unless it was allowed to so amend its answer:

> "* * * plaintiff undoubtedly will succeed in establishing relief" (R. 60).

SUMMARY OF ARGUMENT.

I. The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.

II. The "brief" filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for refund sufficient to support the maintenance of this suit.

III. Petitioner has failed to show either by reason or by authority that the decision of the Circuit Court of Appeals should be reversed.

IV. The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of intangible property acquired in 1916.

ARGUMENT.

POINT I.

The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.

Petitioner concedes that the refund claim filed March 25, 1924, complied with the statute as having been seasonably filed (petitioner's brief, p. 5). It argues, however, that this suit was brought upon grounds for relief which were not brought to the attention of the Commissioner until April 12, 1926, after the time for filing claim had expired and hence that this suit is not brought upon a "duly filed" refund claim as required by the statute. Despite the apparently inadvertent statement in the opinion of the Circuit Court of Appeals to the contrary, respondent has consistently asserted from the beginning of this case, as it now argues, that the original claim for refund sufficiently met the requirements of the statute to allow maintenance of this suit.

The pertinent statute is contained in what is now Section 156, Title 26, U. S. C., which, so far as the portion material to this case is concerned, has remained unchanged since the Revenue Act of 1921. It reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected, without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof;"

Respondent's claim for refund was filed March 25, 1924, when the applicable Treasury Regulations 65, Article 1306, read as follows:

> "Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All *facts* relied upon in support of the claim *should* be clearly set forth under oath * * *."

This article was carried forward without change in later regulations until 1929. In 1929, the Commissioner made a significant change by Treasury Decision 4265, Cumulative Bulletin, VIII-1, page 110, reading as follows:

> "To all Collectors of Internal Revenue and others concerned:
>
> (1) A claim for refund or credit of any internal revenue tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department

(Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim *must set forth* and in detail *each ground* upon which a refund or credit is claimed, and *facts* sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund or credit.

* * * * * * * * *

(3) *These regulations shall take effect on May 1, 1929, and shall be applicable to all claims filed on or after such date,* and all other regulations are modified in so far as they are not consistent with these regulations."

The meaning of Article 1306, Regulation 65, *the regulation which governs this case* is clarified considerably by this change. The controlling regulation provides merely that the facts upon which the claim is based "should"—not "must" or "shall" be set forth under oath. But does it require that such facts be set forth *in the claim?* Neither the statute nor the regulation tells us definitely. When are such facts to be submitted? How? Where? Certainly there is no positive direction that the facts *must* be set forth *in the claim itself at the time it is filed.* The very words of the regulation itself show that the word "facts" is not used synonymously with the word "claim". The regulation does not say that all the facts relied upon should be set forth *in the claim* or that the claim *shall contain all the facts relied upon.* The obvious answer is that the facts could be submitted with or in the claim, or later, as the exigencies of the particular case demanded. The essential thing was that any facts not already in the possession of the Commissioner

were required to be furnished to him before the claim had been disposed of finally by allowance or rejection. (*Union & New Haven Trust Co.* v. *Eaton*, 20 F. (2d) 419; *Warner* v. *Walsh*, 24 F. (2d) 449, 450).

This also is the only practical view. (*Lancaster Cotton Mills* v. *United States*, 59 F. (2d) 270, 275). Frequently the Commissioner will pass on a refund claim upon the data set forth in the return itself or upon data which he secures through his own independent examination of the books of the taxpayer. He is not restricted to the data or grounds advanced by the claimant, *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; *Lancaster Cotton Mills* v. *United States, supra.* Often claims for refund are determined upon information conveyed to the Commissioner for the first time at the oral hearing which usually is granted if requested by the taxpayer. There are many other practical reasons why, at least before experience taught differently, the Commissioner thought it would be unwise to frame a positive requirement that *all facts* and *all* theories of relief had to be set forth in the claim itself. It was entirely logical, therefore, for the Commissioner to say in the regulations that the facts should be set forth under oath, but to leave to the necessities of each particular case the question of whether a statement of facts under oath was necessary, and, if so, when it was to be furnished. We recognize that since 1929 the regulation apparently requires that the claim *must* set forth grounds and facts but since this case is not governed by that regulation, we pass the question of its validity. Prior to 1929, however, it is plain that the facts supporting the claim were not required to be set forth in the claim itself unless the courts are going to legislate into the statute and regulation something that was not inserted by their framers. Plainly a seasonably filed claim was a

"duly filed" claim within the meaning of the statute and the regulation whether or not at the time it was filed it set forth all the facts and theories upon which suit was brought later.

In *Union & New Haven Trust Co.* v. *Eaton,* 20 F. (2d) 419, Judge THOMAS said:

> "* * * *Obviously the statute required nothing more than that a claim for refund be duly filed with the Commissioner of Internal Revenue.* In order to induce favorable action, a claimant will assign as many grounds for such refund as he is cognizant of. It is not to be expected that a claimant will conceal a valid ground for a refund merely in order to obtain an opportunity of incurring the expenses of litigation. It is to be observed that, whether claimant assigned grounds or not, *the statute merely requires that he file his claim for refund. To hold, therefore, that a plaintiff is precluded from asserting a reason for a refund that he has not advanced in his notice of claim is to read a condition into the statute not legislated by Congress.*"

Judge THOMAS then refers to *Tucker* v. *Alexander,* 15 F. (2d) 356, afterwards reversed, 275 U. S. 228 and *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626, both being decisions of the Circuit Court of Appeals for the Eighth Circuit. He proceeded as follows:

> "With due deference, therefore, to the judgment of that court, I find myself unable to accept its conclusions, the more so as that court has failed in either case to quote the specific phraseology in the statute upon which it relies."

In the latter case of *Warner* v. *Walsh,* 24 F. (2d) 449, 450, Judge THOMAS said:

> "The second ground is that, in the claim presented to the Commissioner of Internal Revenue for a refund, 'the alleged purchase for value theory' was not set out as a ground for such refund. I regard the claim as untenable."
>
> • • • • • • • •
>
> *"To say that an argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."*

Judge BURROWS concurred in the above views in the later case of *Warner* v. *Walsh*, 27 F. (2d) 952.

And in the case of *Wunderle* v. *McCaughn*, 38 F. (2d) 258, Judge KIRKPATRICK stated:

> "I am in accord with the view expressed in *Warner* v. *Walsh* (D. C.) 24 F. (2d) 449, and the opinion of *Union & New Haven Trust Co.* v. *Eaton* (D. C.) 20 F. (2d) 419, that, where the Commissioner is appraised of all the material facts, it is immaterial that the theory on which relief is asked is not set out. *Nor, I think, is it material that the wrong theory is set out.*"

Recovery was allowed by both Courts below because of the refusal of the Commissioner to increase the excess actual value over book value of real property owned by reason of its acquisition of a mixed aggregate of tangible and intangible property. In 1916 respondent acquired such a mixed aggregate of tangible and intangible property, including the real property in question. In question 8 of its 1918 tax return, respondent affirmatively answered the question of whether it had ever acquired a mixed aggregate of such property. Respondent's request for special

assessment was based on the abnormal condition existing in its income and *invested capital* by reason of the 1916 acquisition. While it is true that until the submission of the additional brief of April 12, 1926, respondent was more concerned with the adjustment of the value of the intangibles than the tangibles, it is also true that from the time the return was filed the question of the valuation of all tangible property, including real estate, was before the Commissioner; and when the seasonably made claim was filed, this specific question was made an issue—an issue which was still alive in February, 1926, when the solicitor's office was still in doubt as to the denial of special assessment (R. 46), and which, as respondent's tender of evidence at the trial was designed to prove (R. 18) was the subject of the oral hearing March 15, 1926, after the statutory time limit for filing claim had expired.

Petitioner cannot help but concede that from the time respondent filed its return and accompanying request for a special assessment an issue was raised as to the proper computation of respondent's invested capital. There never was any other issue before the Commissioner. Invested capital included tangible and intangible property. The tangible property included respondent's real estate. Intangibles such as good will, contracts and similar assets constituted by far the larger portion of invested capital and hence the arguments advanced before the Commissioner and the evidence submitted in support of such arguments were concerned mainly with the intangibles. The fact remains, however, that not only in the request for special assessment but also in the seasonably filed claim respondent continuously urged that its *entire invested capital* be properly calculated for tax purposes.

There were two ways by which such relief could be obtained, first, through special assessment under Sections

327 and 328 of the Revenue Act of 1921, whereby invested capital is determined by the ratio which the average tax of representative corporations engaged in a similar trade or business bears to their average net income, secondly, by the method of calculation provided by Section 326 of the Act. Although the theories of relief under the two sets of sections were different, the issue was still the same, namely, how should respondent's invested capital be calculated for tax purposes. At all times prior to the filing of the refund claim for 1918 the Commissioner had consistently refused relief under Section 326 to taxpayers in the situation of respondent.

Respondent, therefore, asked for relief in the original claim for 1918, under Sections 327 and 328. After the filing of the refund claim for 1918 and in September, 1925, the Board of Tax Appeals decided the *St. Louis Screw Company* case (2 B. T. A. 649). That decision in a case practically on all fours with this aroused the hope in respondent that it might obtain relief under Section 326. It was after that decision that the so-called amendatory claim was filed. But the Commissioner refused to acquiesce in that decision until 1928, and as matter of fact, denied relief under the refund claim for 1920, although relief was sought therein under Section 326.

The situation is not unlike that disclosed in *Lehigh & Wilkes Barre Coal Co.* v. *United States,* 38 F. (2d) 637, where the United States in a case similar to this asserted that an amendatory claim did not form a proper basis for suit and yet the government itself was responsible for the necessity of the amendment. The Court said:

> "The objection to the form of petitioner's claim as filed February 10, 1925, is that the claim did not specify the ground for the refund of taxes paid. The answer to this objection is that it was impossible

for the petitioner to specify the ground for the refund for the reason that the petitioner's return had not yet been audited, and the petitioner was unable to state at the time the specific ground for its claim for the refund on February 10, 1925, or within the period of the Statute of Limitations. *The law does not compel a person to do an impossible thing and, here the thing was impossible not because of any act of the petitioner, but because of the failure of the Commissioner to audit the petitioner's return* within the period of the Statute of Limitations. *Furthermore the Commissioner of Internal Revenue made no objection to the form of petitioner's claim filed February 10, 1925; this the court considers important in this case.*

Regardless of any defect of form or sufficiency in the original claim for refund, the delay of the Commissioner of Internal Revenue to audit the petitioner's return within the period of the Statute of Limitations and the impossibility on the part of the petitioner to file a more specific claim within the period of the Statute of Limitations *and the fact that no objection was made to the form of the petitioner's original claim for refund which amounts to a waiver of any irregularity and the subsequent amendment, specifying the grounds of petitioner's claim for refund* prior to the final rejection, made the claim effective. *Zeller et al* v. *United States,* 35 Fed. (2) 870; *Art Metal Construction Co.* v. *United States,* 35 Fed. (2) 379; *Philip Wunderle* v. *McCaughn,* U. S. District Court, Eastern District of Pennsylvania, not yet reported; *Tucker* v. *Alexander,* 275 U. S. 228."

Lastly, it is important to note that the statute here involved was enacted as remedial legislation. It was designed to allow recovery by a taxpayer of money which he had paid to the government through mistake. Certainly if there is any doubt as to the meaning or application of the statute

it should be resolved in favor of the taxpayer so as to afford the relief intended instead of being used as a means of preventing the return by the United States of money which does not belong to it.

As was said by this Court in a somewhat analogous situation in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258:

> "The Section is a part of a tax law giving to taxpayers opportunity to secure refund of over payments that had become barred. Manifestly, it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide."

Petitioner conceded in its affidavit in support of its application for permission to amend its answer that respondent was entitled to recover on the merits (R. 60). This was approximately five years after the time for filing claim for refund had expired. During those years the Commissioner had heard arguments and received evidence on the merits of the question of increasing respondent's invested capital, had considered and denied the claim on its merits and afterwards the United States stood by idly for the two and a half years that this case had stood at issue awaiting trial on the merits, before the government in any way indicated that it considered the original claim defective or not a proper basis for suit. The situation is similar to that in *Howbert* v. *Penrose*, 38 F. (2d) 577, 580, where the Circuit Court of Appeals for the Tenth Circuit said:

> "* * * *The defendant concedes that he (the plaintiff) is entitled to it on the merits, and while 'men must turn square corners when they deal with the Government' * * * the government ought to turn square corners when dealing with its citizens.* There is another maxim applicable in both of these appeals and that is that substance should be given

the right of way over form, *Eisner* v. *Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 46 S. Ct. 449, 70 L. Ed. 886.

"The claim for refund should have been more particular; but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer. The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

POINT II.

The "brief" filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for refund sufficient to support the maintenance of this suit.

The Circuit Court of Appeals in ruling in favor of respondent herein, held that the "brief" filed April 12, 1926, was a valid amendment of the seasonably filed claim sufficient under the statute and regulations to support maintenance of this suit since it not only set forth and brought to the attention of the Commissioner the data upon which this suit was brought, but also was accepted, considered and passed on by him. The great weight of authority supports this view.

Tucker v. *Alexander*, 275 U. S. 228, is a leading case. In that case the taxpayer at the trial of a suit based on a rejected claim for refund amended his petition to set up a new and original ground of recovery. Counsel for the government acquiesced in the amendment. The taxpayer recovered on the new theory advanced, but the Circuit Court

of Appeals reversed the judgment on the ground that the statute prevented recovery on a ground of relief which had never been set up in the refund claim filed with the Commissioner. This Court granted certiorari and reversed the Circuit Court of Appeals. In its opinion, the Court, speaking through Mr. Justice STONE said (pp. 231-232):

> "Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States (citing cases). * * * *The Statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.* Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States,* 123 U. S. 227, 31 L. ed. 128, 8 Sup. Ct. Rep. 82. Such waivers if allowed would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—*consequences which do not attach to the waiver here.*"

In *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, the taxpayer had never even filed a formal claim for refund, and hence, *although as in the case at bar, the Commissioner had accepted the data filed as a claim and considered and passed on it as such, the government went into court contending that no timely claim had been filed.* Upon all the circumstances this Court held, speaking through Mr. Justice BUTLER, that, since the Commissioner had treated the documents before him as a claim, and since by his own actions he admitted that he had not been misled, and had been informed of the reason for relief urged in the suit, there was a substantial compliance with the statute which, having been designed for relief rather than for oppression, should be held to have been complied with.

In *Union Trust Co.* v. *McCaughn,* 24 F. (2d) 459, 461, the Court, after quoting *Tucker* v. *Alexander* (*supra*) as to the purposes and objects of a claim for refund, said:

> "If those objects have been attained, the statute has been sufficiently complied with even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view of his letter, he will be held to have done so."

The allowance of a recovery based on an amendment of a timely filed claim for refund was allowed in the following cases, among others, although in each instance the amendment was filed after the time for filing claims had expired:

Lehigh & Wilkes Barre Coal Co. v. *United States, supra;*
Zeller v. *United States,* 35 F. (2d) 870;
McKesson & Robbins v. *Edwards,* 57 F. (2d) 147;
Lancaster Cotton Mills v. *United States, supra;*
Memphis Cotton Oil Co. v. *United States,* 59 F. (2d) 276.

The basis of the decisions is two-fold, first, that the purposes of the statute had been complied with in that the Commissioner by his acceptance and consideration of the claim was being sued on a ground of relief of which he had been fully advised in time to make a refund, and, secondly, even assuming that strict compliance with the statute was necessary, there had been a permissible waiver by the Commissioner of such strict compliance.

In its opinion in *Lancaster Cotton Mills* v. *United States, supra,* the Court makes a significant reference to the practice followed by the office of the Commissioner which is not only particularly apposite here but also illustrates the practical soundness of the Court below in holding that a seasonably filed claim may later be amended before rejection. The Court says (p. 275):

> "It is the regular practice of the Commissioner's office upon the receipt of refund claims to make a record thereof in the claims control section and to route such claims to the proper division of his office for consideration and action, and thereafter to record the action taken thereon. *Williams & Co.* v. *United States,* 39 F. (2d) 1019, 48 F. (2d) 672, 71 Ct. Cl. 1. In point of fact, therefore, it has long been the practice of the Commissioner to consider the cases to which such claims relate and to take some action on the claims. In some cases he allows an overpayment to the extent that it is justified by the record before

him, as in this case. In other cases he calls the attention of the taxpayer to the insufficiency of the claim. In other cases he rejects the claims. This practice of the Commissioner is authorized by the statutes. *We think the practice followed by the Bureau should be given weight in determining whether a claim that is defective gives the Commissioner jurisdiction beyond the limitation period of five years, and we think such a defective claim may be amended and perfected before it has been acted upon by the Commissioner.*''

POINT III.

Petitioner has failed to show either by reason or authority that the decision of the Circuit Court of Appeals should be reversed.

A.

Petitioner's first argument is that the ''brief'' filed April 12, 1926, which the Circuit Court of Appeals held to be an amendment of the claim filed in 1924, must be regarded as an original claim. This argument is based on the theory that the Commissioner was not informed until April 12, 1926, that respondent objected to his failure to include in invested capital the proper value of certain of respondent's real estate and intangibles. As we have already pointed out, up to the amendment of the regulations in 1929, the Courts had held that under the statute permitting suit it was immaterial whether suit was brought on the grounds, theories or statutes referred to in the claim so long as the Commissioner knew what the claim was about. The fact that the Commissioner accepted and passed on the so-called amendatory claim showed that he, the officer charged with the duty of administering the statute, considered the new matter either an amplification or an amendment of the

claim theretofore filed and not a new and original claim. Hence, we believe that it is immaterial whether or not the affidavit and exhibits filed April 12, 1926, set up a new and original theory of recovery. However, we think it plain that the additional memorandum did not constitute a new and original claim within the meaning of the statute as shown by our argument at pages 12-17 under Point I of this brief, and which to avoid repetition will not be repeated here.

B.

Petitioner refers to the recent decision in *Solomon* v. *United States,* 57 F. (2d) 150, where the statement was made that the distinction between what may be amended and what may not be is one of degree and on this premise argues that the situation is analogous to one where an attempt is made to amend a pleading to set up a new and distinctly different cause of action after the Statute of Limitations has run. We feel that there was no amendment here. The arguments advanced and evidence submitted may have varied during the course of the presentation of the case to the Commissioner but the issue remained the same. A closer analogy would be the amendment of a creditor's claim in bankruptcy after the time for filing claim had expired. In such cases, as here, authorization for the filing of claim is given by a remedial statute. The widest possible latitude is allowed in order that *equities and not technicalities may control.* Moreover, great weight must be given to the action of the Commissioner, as the officer charged with the administration of the statute, acting in the exercise of a discretion even greater than that of a trial judge, in allowing the amendment.

C.

Petitioner also suggests that possibly the Commissioner's letter indicating his intention of rejecting the claim might be considered a rejection in which case an amendment would be too late. The fact that neither the Commissioner nor either of the Courts below ever considered that the claim was rejected until the rejection schedule was signed September 3, 1926, furnishes a logical reason for petitioner's temerity in merely suggesting rather than arguing this point. However, in *Michel* v. *United States,* 37 F. (2d) 38, 40, reversed on other grounds, 282 U. S. 656, the Court said:

> "(1, 2) In the present case the clause prescribing notice was intended for the protection of the citizen, and the statute did not begin to run until notice was given. It is said that the letters from the Commissioner advising the plaintiffs here that their claims 'would be rejected' were sufficient notices to comply with the law. The statute, however, prescribes a notice 'after' the disallowance. The word 'after' is not merely technical, but seems to us to go to the essence. It requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophecy of the Commissioner—a prophecy subject to a possible change of the latter's opinion. *The rejection appearing on the schedule approved by the Commissioner, and not the letter forecasting his action, represented his final decision as a matter of law. Girard Trust Co.* v. *United States,* 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524. It is the rendering of this final decision of which notice had to be given."

D.

The point which petitioner seeks to interject that the Commissioner's consideration of the so-called amended claim after notice of his intention to reject the claim involved a possible attempt by him to waive the period within which suit could be brought is foreign to the issues here involved and clearly outside the scope of the permissible argument.

E.

Lastly, only a brief reference to the decisions in similar cases cited by petitioner is needed to show either that they are not in point or support the decision which petitioner seeks to have reversed.

United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, did not involve the same issue that is involved in the case at bar. In that case suit was brought on an altogether different claim than that presented to the Commissioner. *There was not even an attempt to amend the claim, much less acceptance and consideration by the Commissioner of an amendment.* As this Court said:

> "* * * neither in its claim for refund, its brief, nor at the hearing, was mention made of the deduction now claimed."

In *Jonesboro Grocer Co.* v. *United States*, 66 Ct. Cls. 320, the taxpayer in March, 1918, filed its 1917 return paying the tax shown to be due thereon. In July, 1919, the taxpayer filed an amended return for 1917 and a claim for refund of some $400 based thereon. The claim for refund

was rejected but the Commissioner determined that the taxpayer had in other respects overpaid its 1917 tax and allowed an over-assessment of over $1,300, which the taxpayer accepted as a credit against its 1918 tax. At this stage it appeared that both the taxpayer and the Commissioner considered the matter closed. In 1924 and after the expiration of the statutory period *for filing a claim for refund* for the year 1917, the taxpayer filed a new and second claim for a refund of part of its 1917 tax which was in no way related to the first claim for refund and which concededly was not amendatory thereof. The Commissioner failed to note that the second claim was filed too late and allowed it. Later, the Commissioner discovered that the claim had been filed too late and rejected it. Since the claim originally filed had been fully and finally disposed of, before the attempted amendment there was no claim in existence which could jurisdictionally be the subject of amendment.

In *Feather River Lumber Co.* v. *United States,* 66 Ct. Cls. 54, the taxpayer filed a so-called claim for refund of a portion of the tax paid for the year 1918. The Commissioner did not object to the sufficiency of the claim and allowed a refund thereon. In May, 1925, the taxpayer wrote a letter to the Commissioner calling attention to the fact that in auditing the 1918 return the Commissioner had failed to deduct a certain loss. The Court held that suit could not be maintained on the matter set forth in the letter of May, 1925, for the reason that it did not in any sense constitute a claim for refund. It was pointed out that the requirement that the claim for refund must be filed was to give the Commissioner a chance to review his actions and to correct errors, and that he could not do this if the taxpayer failed to advise him of the ground relied upon for recovery. Obviously, that condition did not exist in the case at bar.

The decision in *Grays Harbor Motorship Corp.* v. *United States,* 45 F. (2d) 259, did not involve either an amendment of a claim for refund or a consideration by the Commissioner of the data upon which suit subsequently was brought. Since suit was brought on a theory or ground of which the Commissioner was never advised, it was properly held that the statute had not been complied with.

Snead v. *Elmore,* 59 F. (2d) 312, recognizes the propositions (1) that a claim for refund may be amplified or amended after filing and (2) that the Commissioner may waive the requirement that suit must be brought on the same theory or facts brought to his attention in the claim for refund. As the Court pointed out in that case, however, there was no attempt either in the amendment of the claim or the correspondence between the taxpayer and the Commissioner to set up the reason for recovery upon which the suit was based; moreover, there was no waiver. Hence, the Court held, the taxpayer was precluded from recovering in the suit on the altogether new matter which had never been brought to the attention of the Commissioner.

In *Art Metal Construction Co.* v. *United States,* 47 F. (2d) 558, no claim whatsoever was filed within the statutory time limit and therefore there was nothing to amend. The taxpayer did file a so-called claim which stated that it had overpaid its taxes for the year in question in the sum of "$1 or more" and requested refund of the amount of any overpayment which might be shown to be due under future rulings or decisions or "for other reasons". As the Court said, this was nothing less than an expression of intention to file a claim in the future. The case clearly has no bearing here.

The decision in *Bemis Bros. Hay Co.* v. *United States,* 60 F. (2d) 944, is not controlling here for several reasons.

First, the Court had before it a stipulation, the effect of which was, that the taxpayer could not recover if the claim for refund *as filed "within the time provided for law"* did not set up the ground of relief relied upon in the suit. Secondly, the Court proceeded on the erroneous assumption that a letter from the Commissioner to the taxpayer advising that the claim for refund "will be rejected" was a rejection of the claim. *Michel* v. *United States, supra.* Lastly, the Court pointed out that it was not seriously contended that the Commissioner, by reconsidering the claim after said notice of intention to reject had by waiver, extended the time to amend or amplify the claim.

In *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626, it seems from the opinion of the Court that it raised on its own motion the question of whether the claim sued on was the same one set up in the claim for refund. The Court said the record was not clear on this point and observed that suit cannot be brought on a ground different than that set up in the claim for refund. The decision was based on the merits and hence, apparently, the statement respecting claim for refund was *obiter dictum.*

J. P. Stevens Engraving Co. v. *United States,* 53 F. (2d) 1, and *H. Lissner Co. Inc.* v. *United States,* 52 F. (2d) 1058, like some of the decisions referred to above, did not involve either the question of an amendment to a claim, or a so-called waiver. In each of these cases it was held that the statute will not permit suit on a ground which never has been brought to the Commissioner's attention. In each case the wording of the opinion indicates that the statute would be satisfied if the Commissioner was apprised at any time before rejection of claim of the theory upon which relief was sought in the suit, no matter how informally the data was presented to him.

In *Solomon* v. *United States,* 57 F. (2d) 150, the taxpayer had filed a claim seeking relief on a ground concededly different from that upon which suit was brought. The taxpayer stated in the claim that brief in support thereof would follow. No brief or data was submitted in support of the claim. Accordingly the Commissioner notified the taxpayer that the claim would be rejected for lack of information and later formally rejected it by signing a rejection schedule containing the rejection. Thereafter the taxpayer asked for leave to reopen the claim, but the request was denied. The Court naturally held that the suit could not be maintained.

J. H. Williams & Co. v. *United States,* 46 F. (2d) 155, is another case which does not involve the questions of amendment or of waiver. The case is somewhat similar in its other aspects to the *Art Metal* case, where the taxpayer filed what was really only a notice of intention to file a claim later. As in that case, the taxpayer stated that it was without information to support the claim, which was being filed merely to save its rights under the statute of limitation. Obviously, the decision deals with a situation which is altogether different from the case at bar.

Taylor-Lockwood Co. v. *United States,* 45 F. (2d) 284, likewise did not involve any question of amendment or of waiver. The sole issue was whether the timely filed claim set forth the same grounds of relief as was urged in the suit. The Court held that it did not and accordingly denied a recovery.

POINT IV.

The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of the intangible property acquired in 1916.

Respondent was organized in August, 1916, with a capital of $10,000 (R. 18). The purpose of the organization was to acquire the business, property and assets of Prentiss Tool & Supply Company, a corporation organized in 1878, and which, from that date to 1916, had been engaged in the business of buying and selling machine tools (R. 18, 19, 45-49). On August 17, 1916, plaintiff acquired from Prentiss Tool & Supply Company 100 shares of Atchison, Topeka & Santa Fe stock, at that time owned by the latter company, and issued in payment therefor all of its own capital stock (R. 18, 45, 46). The stock so acquired had an actual value of $10,000, was carried on the books of Prentiss Tool & Supply Company in the sum of $10,000 and was entered on the books of plaintiff at the same sum (R. 18).

Immediately thereafter the capital stock of plaintiff was increased to $500,000 (R. 54). Thereupon arrangements were made between plaintiff and Prentiss Tool & Supply Company whereby the latter was to sell to plaintiff and plaintiff was to acquire all of the "business, property and assets, real and personal, of Prentiss Tool & Supply Company, *including name, good will, contracts and rights of every character and description*", subject, however, to the debts and obligations of that company (R. 46-49).

The arrangement provided that plaintiff was to issue 4,900 shares of its capital stock of the par value of $490,000 in payment for the property to be so acquired (R. 46).

The arrangement for such sale and acquisition is set forth in, and authorized by, resolutions adopted at meetings of stockholders and directors of both companies held August 17, 1916, and August 26, 1916. Copies of the resolutions are annexed to the stipulation of facts entered into between the parties herein (R. 45-52) and were also attached to the brief filed with the Commissioner of Internal Revenue dated April 8, 1926, being Exhibit No. 12, not printed in accordance with stipulation and order omitting exhibits (R. 122).

The sale was effected, the properties were acquired by plaintiff, the stock was issued therefor, and the transaction was in all respects performed and carried out and set forth in the resolutions above referred to.

The property so acquired by plaintiff for $490,000 par value of its stock consisted of cash, accounts receivable, securities, inventories, fixed assets and intangibles.

There was no entry on the books of the Prentiss Tool & Supply Company covering intangibles or the value thereof. It is stipulated, however, that the Prentiss Tool & Supply Company owned intangible properties which were included in the transfer and that plaintiff acquired such intangibles and that the value thereof was at least $300,000 (R. 43). The fact is that the exclusive sales agency contracts, among other intangible assets acquired by respondent from its predecessor, were the main income-producing factors in its business and constituted assets of great value.

Plaintiff in opening its books entered the property and assets acquired at the same value and in the same manner as theretofore carried on the books of Prentiss Tool & Supply Company, and the opening balance sheet of plaintiff was the same as the closing balance sheet of Prentiss Tool & Supply Company, except for necessary changes in surplus

and capital, the normal incident of the higher capital of plaintiff. Plaintiff did not make any entry or show on its books any item for intangibles or the values existing therein.

Section 326 (a) of the Revenue Act of 1918 (40 Stat. 1092) provides:

> "(a) That as used in this title the term 'invested capital' for any year means * * * :
>
> (4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest; * * * "

Section 325 (a) of the Act provides that good will, franchises and other like property are included within the term intangible property.

The first authoritative decision construing paragraph 4 of Section 326 was handed down by the Board of Tax Appeals in the case of *St. Louis Screw Company,* 2 B. T. A., 649. We believe that that case is on all fours with the case at bar. There the taxpayer had been organized with a capital stock of $200,000 to take over the business of another corporation of the same name whose charter had expired. The said $200,000 of capital stock was issued for "all of the business and assets, real, personal and mixed, and the good will of said dissolved corporation." The value of the tangible assets was greatly in excess of $200,000. Among the intangible assets were two income producing patents and also good will. The issue involved was whether the taxpayer was entitled to include in invested capital any part

of the cash value of the patents and good will acquired by it. The Board of Tax Appeals in ruling in favor of the taxpayer said:

> "There can be no question as to the right of this taxpayer, under the provisions of both Acts, to include in invested capital the full cash value of tangible properties paid in for shares of stock at the time of payment, including the excess of the actual cash value of such properties over the consideration paid therefor, a right which the Commissioner had properly conceded. But what was the par value of the shares of stock by which the excess of the value of the tangibles should be measured? What was the par value of the shares of stock, if any, issued for the patents? And, finally, was the good will bona fide purchased with shares of stock of this taxpayer?
>
> "As has been noted above, the taxpayer issued $200,000 capital stock for tangibles and intangibles having an aggregate value of $489,558.27. *No part of this total was specifically issued for either the tangibles, patents, or good will. It is no more correct to say that the capital stock was issued for the tangibles than it is to say that it was issued for the patents and good will. We therefore think that the Commissioner erred in applying the entire amount of the capital stock issued against the tangibles and in refusing to allow the inclusion in invested capital of any amount whatever for patents or good will.* Inasmuch as the entire capital stock was specifically issued for three classes of assets, *we think that the amount thereof should be allocated to the three classes of assets according to their cash value at the time paid in.* Upon such a computation it is found that $170,020 capital stock should be allocated to tangibles, $12,440 capital stock to patents, and $17,540 capital stock to good will. Since no part of the capital stock was specifically issued for any class of assets, the taxpayer is entitled to a paid-in surplus of

the excess cash value of the net tangibles over the par value of the capital stock allocated to such assets:

Net cash value of tangibles	$416,174.26
Par value of capital stock allocated thereto	170,120.00
Paid-in surplus	$246,154.26"

That decision was reaffirmed subsequently in other cases decided by the Board of Tax Appeals, among them being:

Appeal of Mandel Brothers, 4 B. T. A. 341;
Tyler & Hippach, Inc., 6 B. T. A. 636;
Penn. Cent. Brewing Co., 9 B. T. A. 264;
D. N. & E. Walter & Co., Inc., 10 B. T. A. 620.

In 1928 the Commissioner of Internal Revenue acquiesced in this decision, Cumulative Bulletin VII-1, p. 28, Rulings, January to June, 1928.

The District Court arrived at the same decision, saying that there was no doubt, as stated in the stipulation, that the intangibles were part of the consideration paid for the $490,000 issue of capital stock when originally issued and that the facts and not the book entries should govern (R. 25).

Doyle v. *Mitchell,* 247 U. S. 179, 187;
Isbell Porter Co. v. *Commissioner of Internal Revenue,* 40 F. (2d) 432.

In *Lafayette-South Side Bank* v. *Commissioner,* 33 F. (2d) 646, 648, the Board of Tax Appeals had refused to include good will in invested capital on the amalgamation of two banks. On appeal to the Court of Appeals for the

District of Columbia that Court affirmed the decision, saying:

> "Appellants' contention, however, is effectually answered by the fact that the parties expressly stipulated in the organic contract that no value should be placed upon the good will of the old banks when transferred to the new bank, and that no stock was actually issued therefor. The value of the good will accordingly cannot be included in the invested capital *since no stock was issued therefor.*"

We believe that that case impliedly concedes that where stock is issued for a mixed aggregate of tangibles and intangibles, as here, the taxpayer is entitled to include intangibles in invested capital. If in that case as here there had been a provision that stock should be issued for a mixed aggregate of tangibles and intangibles, the Board of Tax Appeals and the Court of Appeals would have followed the *St. Louis Screw Company, supra.*

The Circuit Court of Appeals herein based its decision on the ground that there should have been a specific issue of stock for intangibles. The Court said (R. 79):

> "It is apparent that to include good will as invested capital the stock of the company must be specifically issued for the intangibles. It is not enough to issue it for the property generally which was taken over."

Plainly this holding is directly contrary to the decision in the *St. Louis Screw Company* case (*supra*) and the decisions in similar cases by the Board of Tax Appeals cited above.

Only a brief reference is necessary to the cases cited by the Circuit Court of Appeals in support of its holding to show their inapplicability.

The case of *LaBelle Iron Works* v. *U. S.*, 256 U. S. 377, deals with the question of the right to capitalize an increase in the value of property as earned surplus. It does not deal with a case where there has been the acquisition by purchase of property for shares in a corporation, and, therefore, Section 326 (a) is not applicable.

In *Crossett* v. *U. S.*, 50 F. (2d) 292, the Court of Claims specifically stated in its opinion:

> "It was agreed that of said property acquired, sufficient was to be taken at book value to pay at par for said stock, and the balance was to constitute a surplus at the organization of the corporation."

In other words, the *Crossett* case is exactly similar to the case of *Lafayette-Southside Bank* v. *Commissioner* (*supra*) because it was specifically agreed that the stock was paid for with the tangibles and not with intangibles.

In *Landesman* v. *Commissioner*, 44 F. (2d) 521, there was a definite finding that all the stock was issued for tangibles and no stock was issued for intangibles. The Court did state that no doubt good will existed and was acquired by the corporation and was in that sense probably an element affecting consideration paid for the property acquired. It was pointed out, however, that no stock was issued for the intangibles. In the present case there is an express finding amply supported by the evidence that stock was issued for intangibles. From the records of the *Landesman* case as it appears in 15 B. T. A. 64-66, it appears that the resolutions under which the stock was issued provided that all of the stock should be issued for specific tangible properties. In the instant case the resolution was that the stock should be issued for tangibles and intangibles and there is a finding of fact that stock was issued for good will. The Board of Tax Appeals in the *Landesman* case

neither enlarged upon nor overruled its prior decision in the *St. Louis Screw Company* case which has been consistently followed by the Board of Tax Appeals. The Board of Tax Appeals in the *Landesman* case disposed of the case upon the ground that the existence of good will had not been established.

We believe, therefore, that the decision of the Circuit Court of Appeals in refusing the inclusion in invested capital of the intangible property for the years 1918 and 1920 was erroneous.

Conclusion.

The decision of the Circuit Court of Appeals, so far as it denies the inclusion of the value of intangible property in invested capital for the years 1918 and 1920 should be reversed, and its decision as to the inclusion in invested capital of the actual value of real property for the years 1918 and 1920 should be affirmed.

Respectfully submitted,

JEFFERY & REDMOND,
Attorneys for Respondent.

JOSEPH F. MURRAY,
WILLIAM P. JEFFERY,
ARTHUR MATTSON,
of Counsel.

Appendix.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1091, 1092, 1093:

SEC. 325. (a) That as used in this title—

The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trade-marks, trade-brands, franchises and other like property;

The term "tangible property" means stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, leaseholds, and other property other than intangible property;

The term "borrowed capital" means money or other property borrowed, whether represented by bonds, notes, open accounts, or otherwise;

The term "inadmissible assets" means stocks, bonds, and other obligations (other than obligations of the United States), the dividends or interest from which is not included in computing net income, but where the income derived from such assets consists in part of gain or profit derived from the sale or other disposition thereof, or where all or part of the interest derived from such assets is in effect included in the net income because of the limitation on the deduction of interest under paragraph (2) of subdivision (a) of section 234, a corresponding part of the capital invested in such assets shall not be deemed to be inadmissible assets;

The term "admissible assets" means all assets other than inadmissible assets, valued in accordance with the provisions of subdivision (a) of section 326, section 330, and section 331.

(b) For the purposes of this title, the par value of stock or shares shall, in the case of stock or shares issued at a nominal value or having no par value, be deemed to be the fair market value as of the date or dates of issue of such stock or shares.

SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivisions (b) and (c) of this section):

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus: *Provided,* That the Commissioner shall keep a record of all cases in which tangible property is included in invested capital at a value in excess of the stock or shares issued therefor, containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, the value of the tangible property at the time paid in, the par value of the stock or shares specifically issued therefor, and the amount included under this paragraph as paid-in surplus. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;

(4) Intangible property bona fide paid in for stock or shares prior to March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of

the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding on March 3, 1917, whichever is lowest;

(5) Intangible property bona fide paid in for stock or shares on or after March 3, 1917, in an amount not exceeding (a) the actual cash value of such property at the time paid in, (b) the par value of the stock or shares issued therefor, or (c) in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year, whichever is lowest: *Provided,* That in no case shall the total amount included under paragraphs (4) and (5) exceed in the aggregate 25 per centum of the par value of the total stock or shares of the corporation outstanding at the beginning of the taxable year; but

(b) As used in this title the term "invested capital" does not include borrowed capital.

(c) There shall be deducted from invested capital as above defined a percentage thereof equal to the percentage which the amount of inadmissible assets is of the amount of admissible and inadmissible assets held during the taxable year.

(d) The invested capital for any period shall be the average invested capital for such period, but in the case of a corporation making a return for a fractional part of a year, it shall (except for the purpose of paragraph (2) of subdivision (a) of section 311) be the same fractional part of such average invested capital.

The average invested capital for the pre-war period shall be determined by dividing the number of years within that period during the whole of which the corporation was in existence into the sum of the average invested capital for such years.

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable

year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

Revenue Act of 1921, c. 136, 42 Stat. 227, 268:

SEC. 252. That if, upon examination of any return of income made pursuant to * * * the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the

taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 342:

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 281 of the Revenue Act of 1924, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66, 116:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918 * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-

profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. App., Title 26, Sec. 1065.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall

be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Treasury Regulations 62:

ART. 1036. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. • • •